

## CCRB INVESTIGATIVE RECOMMENDATION

Investigator: Jennifer Smith	Team: Squad #7	CCRB Case #: 201809797	<input checked="" type="checkbox"/> Force	<input checked="" type="checkbox"/> Discourt.	<input type="checkbox"/> U.S.
			<input checked="" type="checkbox"/> Abuse	<input type="checkbox"/> O.L.	<input type="checkbox"/> Injury
Incident Date(s) Tuesday, 11/13/2018 8:30 PM	Location of Incident: 18th Avenue and McDonald Avenue	Precinct: 66	18 Mo. SOL 5/13/2020	EO SOL 12/28/2020	
Date/Time CV Reported Tue, 11/13/2018 9:09 PM	CV Reported At: IAB	How CV Reported: Phone	Date/Time Received at CCRB Mon, 11/26/2018 11:00 AM		

Complainant/Victim	Type	Home Address

Witness(es)	Home Address

Subject Officer(s)	Shield	TaxID	Command
1. POM Marc Fontana	16274	951741	070 PCT
2. POM Edward Obrien	03529	961548	070 PCT

Witness Officer(s)	Shield No	Tax No	Cmd Name
1. POF Lisbeth Delahoz	26305	965035	066 PCT
2. POF Olga Berkovich	07979	963400	066 PCT
3. POF Brianna Edgeworth	08312	960489	066 PCT
4. POM Santiago Machuca	23853	963130	066 PCT
5. POF Nyasha Romeo	23727	963244	066 PCT
6. POF Jennifer Desanto	00549	960452	066 PCT

Officer(s)	Allegation	Investigator Recommendation
A.POM Edward Obrien	Discourtesy: Police Officer Edward Obrien spoke discourteously to § 87(2)(b)	
B.POM Edward Obrien	Abuse: Police Officer Edward Obrien threatened § 87(2)(b) with the use of force.	
C.POM Edward Obrien	Force: Police Officer Edward Obrien used physical force against § 87(2)(b)	
D.POM Marc Fontana	Force: Police Officer Marc Fontana used physical force against § 87(2)(b)	
E.POM Marc Fontana	Abuse: Police Officer Marc Fontana refused to provide his shield number to § 87(2)(b)	

### Case Summary

On November 13, 2018, § 87(2)(b) § 87(2)(b) -old, called 911 and filed this complaint as a witness, which was received at the CCRB on November 26, 2018.

On November 13, 2018, at approximately 8:30 p.m., Police Officer Edward O'Brien and Police Officer Marc Fontana, of the 70<sup>th</sup> Precinct, responded to the intersection of 18<sup>th</sup> Avenue and McDonald Avenue in Brooklyn (which is on the border of the 70<sup>th</sup> and 66<sup>th</sup> Precincts), after § 87(2)(b) crashed his vehicle. PO O'Brien spoke discourteously to § 87(2)(b) § 87(2)(b) (**Allegation A: Discourtesy**, § 87(2)(g)) PO O'Brien threatened § 87(2)(b) with the use of force (**Allegation B: Abuse of Authority**, § 87(2)(g)) PO O'Brien and PO Fontana used physical force against § 87(2)(b) (**Allegations C and D: Force**, § 87(2)(g)) § 87(2)(g) § 87(2)(b) was transported to § 87(2)(b) Medical Center. No arrest or summons resulted from this incident. § 87(2)(b) saw PO Fontana and PO O'Brien after the incident, and PO Fontana allegedly refused to provide his shield number to § 87(2)(b) (**Allegation E: Abuse of Authority**, § 87(2)(g))

Video evidence from social media and various news sources captured this incident.

### Findings and Recommendations

**Allegation A - Discourtesy: Police Officer Edward Obrien spoke discourteously to § 87(2)(b)**

**Allegation B – Abuse of Authority: Police Officer Edward Obrien threatened § 87(2)(b) with the use of force.**

**Allegation C - Force: Police Officer Edward Obrien used physical force against § 87(2)(b)**

**Allegation D - Force: Police Officer Marc Fontana used physical force against § 87(2)(b)**

It is undisputed that § 87(2)(b) side-swiped 10 parked vehicles before colliding with a pole, and that approximately 100 people surrounded the scene of the collision. It is undisputed that § 87(2)(b) was transported to the hospital after this incident.

§ 87(2)(b) (01 Board Review) said that he approached the scene because he heard screams coming from the direction of the accident. § 87(2)(b) and EMS from § 87(2)(b) Medical Center were at the scene. § 87(2)(b) was still in the driver's seat of his vehicle. Another vehicle had parked behind § 87(2)(b) to prevent him from reversing. § 87(2)(b) also observed that § 87(2)(b)'s tires were "popped." Witnesses who saw the accident said that § 87(2)(b) did not know what was going on, that he thought he was still driving after he had crashed, and that he had some neurological disorder. § 87(2)(b) observed § 87(2)(b) to not be fully conscious, but then he observed § 87(2)(b) gain consciousness, and he started to reverse his vehicle. The people surrounding § 87(2)(b)'s vehicle banged on his windows, telling him to open his driver door. § 87(2)(b)'s driver door opened. An unidentified individual entered § 87(2)(b)'s vehicle, turned off the vehicle, and gave the keys to the EMTs. § 87(2)(b) and the § 87(2)(b) EMTs began treating § 87(2)(b) but had trouble because of the large crowd surrounding his vehicle. § 87(2)(b) called 911, reporting a need for crowd control at the scene, and that people in the crowd were arguing and becoming violent. Shortly after, four officers arrived at the scene, including PO O'Brien and PO Fontana. The officers ordered the crowd to disperse, but no one listened to them. PO O'Brien and PO Fontana intervened while EMTs were trying to get § 87(2)(b) to exit his vehicle. PO O'Brien and PO Fontana grabbed onto § 87(2)(b)'s left wrist and

shoulder, and tried to pull him out of the vehicle. § 87(2)(b)'s shirt start to rip as a result, and his shoulder was exposed. PO O'Brien said, "Get out of the fucking car," and "fuck you," approximately 10 to 15 times. Part of § 87(2)(b)'s body was out of the vehicle, but his feet never left his vehicle. PO O'Brien and PO Fontana pushed § 87(2)(b) back into his vehicle. PO O'Brien and PO Fontana used no additional force against § 87(2)(b) and he did not appear injured resulting from the force they used.

§ 87(2)(b) declined to participate in the investigation because he was living abroad (02 Board Review).

A video (03 Board Review) recorded by an unknown individual that was posted on Twitter, captured the allegations in this incident. The video captures § 87(2)(b) in the driver's seat of his vehicle with § 87(2)(b) EMTs inside of his vehicle, § 87(2)(b) EMTs outside, and PO Fontana and PO O'Brien outside his driver door, which is open. At 0:06, PO O'Brien is heard saying to § 87(2)(b) "Fucking touch me - I swear to God, I will fuck you up." Between 0:09 and 0:15, PO O'Brien is seen placing his hand on § 87(2)(b)'s left wrist, and his other hand on the left side of § 87(2)(b)'s shirt collar. PO O'Brien pulls § 87(2)(b)'s shirt collar with both hands. § 87(2)(b)'s left shoulder becomes exposed. PO Fontana grabs § 87(2)(b)'s left forearm. At 0:14, PO O'Brien is heard saying to § 87(2)(b) "Get out of the fucking car. Get out of the fucking car." An EMT is heard saying to PO O'Brien, "Relax, don't hurt him. We're on film." At 0:19, PO O'Brien is heard saying, "I don't give a fuck. Get out of the fucking car."

PO O'Brien (04 Board Review) said that the radio run came over as a vehicle accident with a possibly intoxicated driver. Upon responding, PO O'Brien asked the EMTs on scene if § 87(2)(b) who was still sitting in the driver's seat of his vehicle, was okay. An EMT said that they needed to get § 87(2)(b) out of his vehicle, that he was not listening, that he was being aggressive and combative, and that he wanted to move his vehicle. The EMT did not say whether § 87(2)(b) was intoxicated or if he had a medical condition. PO O'Brien and PO Fontana approached § 87(2)(b) in his vehicle. PO O'Brien said, "Sir, you have to get out of the car." PO O'Brien repeated that statement multiple times. § 87(2)(b) was making broken statements and slurring his words, which made it difficult for PO O'Brien to understand what he was saying. § 87(2)(b) moved his arms and hands in and out of the car, and in PO O'Brien's face. § 87(2)(b) said, "I want to move my car. I want to move my car," and looked inside his center console, which made PO O'Brien think that he was looking for his keys. § 87(2)(b) also put his feet on the pedals. At that point, PO O'Brien thought § 87(2)(b) had his car key in his possession, though PO O'Brien never saw § 87(2)(b) holding his car key. PO O'Brien told § 87(2)(b) to "Get the fuck out of the car," because he feared for his life, for PO Fontana's life, and for the lives of the people gathered around the scene. PO O'Brien thought § 87(2)(b) would drag the officers and the crowd standing in front and behind the vehicle. PO O'Brien did not use any additional profanity toward § 87(2)(b). PO O'Brien did not threaten § 87(2)(b) with the use of force. PO O'Brien pulled § 87(2)(b) by his arm, to eject him from his vehicle, but § 87(2)(b) moved his body away from PO O'Brien. PO Fontana was holding § 87(2)(b)'s legs because of him having put his feet on the pedals. An EMT, who was sitting inside § 87(2)(b)'s vehicle, said that he had § 87(2)(b)'s car keys and that nothing was inside of his center console. The EMTs sedated § 87(2)(b) and removed him from his vehicle, and onto a stretcher. PO O'Brien and PO Fontana left the scene and had no further involvement in the

incident. PO O'Brien was shown the video referenced above during his interview, and he acknowledged threatening § 87(2)(b) with the use of force, but he did not recall doing so.

PO Fontana's statement (05 Board Review) was generally consistent with PO O'Brien's statement. PO Fontana added that the crowd was formed in a semi-circle around § 87(2)(b)'s vehicle. PO Fontana also added that the EMTs reported that § 87(2)(b) was fighting with them, that he was possibly under the influence of drugs or alcohol because he did not seem "all there," and that he refused to answer their questions. § 87(2)(b) made statements to the effect of "Fuck you, no," to the officers when they asked him to exit his vehicle to get medical treatment. When § 87(2)(b) looked inside his center console while talking to the officers, he was holding the key to his vehicle, which was a key fob for his push-to-start vehicle. § 87(2)(b) put his foot on the brake, and PO Fontana pulled § 87(2)(b)'s leg from the brake because he thought § 87(2)(b) was going to press the start button and start driving. § 87(2)(b) grabbed PO Fontana's arm, and said, "I just want to move my car. Just let me pull my car over. I want to move my car." At that point, PO O'Brien pulled § 87(2)(b)'s hand off PO Fontana's arm, and that was the only force PO O'Brien used against § 87(2)(b). § 87(2)(b) repeated that he wanted to move his car, and said, "What did I do?" PO Fontana told § 87(2)(b) multiple times that he was trying to help him. After the EMTs sedated § 87(2)(b) and removed him from his vehicle, officers from the 66<sup>th</sup> Precinct handled the remainder of the incident. PO Fontana said he did not recall whether PO O'Brien used profanity during the incident, and upon seeing the video, he denied knowing whether the officer using profanity was PO O'Brien.

NYPD Patrol Guide, Procedure 203-09 (06 Board Review) states that officers must be courteous and respectful during public contact.

In NYPD Disciplinary Case #79627/04 Assistant Deputy Commissioner of Trail, Robert W. Vinal, decided the following: "When a police officer uses an otherwise impolite word during a stressful street encounter where that officer is attempting to maintain control of the situations, the police officer's verbal slip does not rise to the level of actionable misconduct."

NYPD Patrol Guide, Procedure 221-01 (07 Board Review) states that when appropriate and consistent with personal safety, members of the service will use de-escalation techniques to safely gain compliance from a subject to reduce or eliminate the necessity to use force. In situations where that is not safe or appropriate, officers will use only the reasonable force necessary to gain control or custody of a subject. In determining whether the use of force is reasonable, members of the service should consider the following: the nature and severity of the crime/circumstances, actions taken by the subject, duration of the action, immediacy of the perceived threat or harm to the subject/officers/bystanders, whether the subject is actively resisting custody, whether the subject is attempting to evade arrest by flight, number of subjects in comparison to the number of officers, size/age/condition of the subject in comparison to the officers, the subject's violent history, the presence of hostile crowd or agitators, and whether the subject is apparently under the influence of a stimulant/narcotic which would affect pain tolerance or increase the likelihood of violence.

Civilian and officer statements were consistent in their accounts of § 87(2)(b) being perhaps cognitively impaired during the incident and that he was still trying to drive his crashed vehicle. They were further consistent regarding the crowded scene of his vehicle accident, with people surrounding the vehicle he was trying to drive. The video footage generally corroborates those accounts. PO O'Brien said he used profanity and force against § 87(2)(b) because he feared for his life, fellow officer lives, and civilian lives, which appears

reasonable given the circumstances, but the video shows PO O'Brien with an elevated temper while his partner and the EMTs around him attempt to calm him down, and stop him from what he is doing. His threat of force to "fuck up" § 87(2)(b) and forcefully tugging at § 87(2)(b)'s shirt, appear to go beyond a verbal slip while trying to maintain control of a chaotic situation, so much so that his partner had to calm him down. These comments were a gratuitous execution of profanity and force against § 87(2)(b) who had just been in a car accident and was apparently cognitively impaired. Given the above, the investigation determined that PO O'Brien was not in adherence with the Patrol Guide when he used profanity against § 87(2)(b) threatened him with the use of force, and used an unreasonable amount of force when trying to pull him out of the vehicle. § 87(2)(g)

While § 87(2)(b) alleged that PO Fontana pulled § 87(2)(b) out of the vehicle, the video depicts PO Fontana as using minimal force and he is only seen touching § 87(2)(b)'s arm when PO O'Brien is pulling him. PO Fontana said the only force he used was removing § 87(2)(b)'s leg from the brake to prevent him from driving, which was consistent with PO O'Brien's statement, who acknowledged being the only officer attempting to pull § 87(2)(b) out of his vehicle. The investigation therefore determined that PO Fontana was in adherence with the Patrol Guide when he used force to control § 87(2)(b) § 87(2)(g)

**Allegation E – Abuse of Authority: Police Officer Marc Fontana refused to provide his shield number to § 87(2)(b)**

§ 87(2)(b) said when he was walking home after the incident, he saw PO O'Brien and PO Fontana in their police vehicle. PO O'Brien was driving and PO Fontana was in the passenger vehicle. § 87(2)(b) approached PO Fontana's window when the officers stopped at a traffic light. § 87(2)(b) asked, "What's your number?" PO Fontana was silent. PO O'Brien said, "911." § 87(2)(b) said, "No, what's your ID?" § 87(2)(b) was asking the officers' shield numbers, though he did not explicitly say that. PO O'Brien said his shield number which included "35", but § 87(2)(b) did not write down the number because he thought PO O'Brien may have been joking because he had said "911" before. PO Fontana never said anything to § 87(2)(b) PO O'Brien and PO Fontana drove away. § 87(2)(b)'s IAB report is consistent with his allegation – immediately after the incident, he called IAB and reported that the officers were driving RMP #5495, that he had asked for the officers' shield numbers, and that he had not obtained them (13 Board Review). During § 87(2)(b)'s phone statement (12 Board Review), he said that during his IAB call, he was provided with PO O'Brien and PO Fontana's shield numbers, and that PO O'Brien's shield number was "3529."

PO O'Brien acknowledged that an individual (he did not recognize § 87(2)(b) when shown a photograph of him) asked for his name and shield number at some point during the incident. PO O'Brien said he provided his name and shield number to that civilian, but denied an individual asking for PO Fontana's name.

PO Fontana acknowledged that a young man approached him and PO O'Brien, in their vehicle, when they were leaving the scene of the incident, and asked for their names and shield numbers. PO Fontana stated his last name and shield number to that young man. He was shown a photograph of § 87(2)(b) and he did not know whether the young man he spoke to was § 87(2)(b). He said the young man may not have heard him because he said his last name and shield number very fast.

NYPD Patrol Guide, Procedure 203-09 states that officers must courteously and clearly state their name, and shield number to anyone who requests it.

Civilian and officer statements were inconsistent in whether PO Fontana answered § 87(2)(b)'s request to provide his shield number, but PO Fontana acknowledged saying his last name and shield number in a manner that § 87(2)(b) may not have heard it. Given that, and given that § 87(2)(b) did not obtain PO Fontana's shield number, the investigation determined that PO Fontana was not in adherence with the Patrol Guide by not clearly stating his shield number. § 87(2)(g)

#### **Civilian and Officer CCRB Histories**

- This is the first CCRB complaint to which § 87(2)(b) has been a party (08 Board Review).
- This is the first CCRB complaint to which § 87(2)(b) has been a party (09 Board Review).
- PO O'Brien has been a member-of-service for two years and has been a subject in one CCRB complaint and one allegation, which was not substantiated. § 87(2)(g)
- PO Fontana has been a member-of-service for seven years and has been a subject in three CCRB complaints and seven allegations, of which four were substantiated.
  - Case 201311018 involved substantiated allegations of abuse of authority (vehicle search) and abuse of authority (frisk). The Board recommended charges, and the NYPD imposed the forfeiture of five vacation days.
  - Case 201312036 involved substantiated allegations of abuse of authority (search of a person) and abuse of authority (stop). The Board recommended charges, and the NYPD imposed the forfeiture of five vacation days.

#### **Mediation, Civil and Criminal Histories**

- § 87(2)(b) declined to mediate this complaint, and § 87(2)(b) declined to participate in the investigation in any form.
- On March 22, 2019, a Notice of Claim request was submitted to the New York City Comptroller's Office, and it will be added to the casefile upon receipt.
- § 87(2)(b)
- § 87(2)(b)

Squad No.: 7

Investigator: \_\_\_\_\_  
Signature Print Title & Name Date

Squad Leader:	_____	_____	_____
	Signature	Print Title & Name	Date
Reviewer:	_____	_____	_____
	Signature	Print Title & Name	Date